AND
BRIEFS

No. 16-299

In the Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS

v.

DEPARTMENT OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
JOHN C. CRUDEN
Assistant Attorney General
J. DAVID GUNTER II
ROBERT J. LUNDMAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals has original jurisdiction under 33 U.S.C. 1369(b)(1) over a petition for review challenging a regulation that defines the scope of the term "waters of the United States" in the Clean Water Act.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 10
Conclusion 25

TABLE OF AUTHORITIES

Cases:

American Farm Bureau Fed'n v. *United States EPA*, 792 F.3d 281 (3d Cir. 2015), cert. denied, 136 S. Ct. 1246 (2016) 18

American Mining Congress v. *United States EPA*, 965 F.2d 759 (9th Cir. 1992) 24

Christopher v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012) 17

Coeur Alaska, Inc. v. *Southeast Alaska Conservation Council*, 557 U.S. 261 (2009) 2

Crown Simpson Pulp Co. v. *Costle*, 445 U.S. 193 (1980) 7, 11, 12, 13, 14, 17

Decker v. *Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326 (2013) 5

EPA v. *Friends of the Everglades*, 134 S. Ct. 421 (2013) 21

E.I. du Pont de Nemours & Co. v. *Train*, 430 U.S. 112 (1977) 7, 11, 12, 14, 15

Friends of the Earth, Inc. v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000) 2

Friends of the Everglades v. *United States EPA*, 699 F.3d 1280 (11th Cir. 2012), cert. denied, 134 S. Ct. 421, and 134 S. Ct. 422 (2013) 20, 21, 22

Cases—Continued: Page

Georgia v. *McCarthy*:
No. CV 215-79, 2015 WL 5092568 (S.D. Ga. Aug. 27, 2015) 9, 22
833 F.3d 1317 (11th Cir. 2016) 10, 24
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 24
Iowa League of Cities v. *EPA*, 711 F.3d 844 (8th Cir. 2013) 19
Loughrin v. *United States*, 134 S. Ct. 2384 (2014) 17
Major League Baseball Players Ass'n v. *Garvey*, 532 U.S. 504 (2001) 25
Murray Energy Corp. v. *United States EPA*, No. 15CV110, 2015 WL 5062506 (N.D. W. Va. Aug. 26, 2015) 9
National Cotton Council of Am. v. *United States EPA*, 553 F.3d 927 (6th Cir. 2009), cert. denied, 559 U.S. 936, and 130 S. Ct. 1505 (2010) 7, 8, 21
Natural Res. Def. Council v. *United States EPA*, 526 F.3d 591 (9th Cir. 2008) 23
Natural Res. Def. Council, Inc. v. *United States EPA*, 966 F.2d 1292 (9th Cir. 1992) 23
Natural Res. Def. Council, Inc. v. *U.S. EPA*, 673 F.2d 400 (D.C. Cir. 1982), cert. denied, 459 U.S. 879 (1982) 15, 16, 18, 20
North Dakota v. *U.S. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015) 10, 19
Northwest Envtl. Advocates v. *United States EPA*, 537 F.3d 1006 (9th Cir. 2008) 20, 23, 24
Oklahoma ex rel. Pruitt v. *United States EPA*, No. 15-cv-0381, 2016 WL 3189807 (N.D. Okla. Feb. 24, 2016) 9
Rapanos v. *United States*, 547 U.S. 715 (2006) 3, 4

Cases—Continued: Page

Reiter v. *Sonotone Corp.*, 442 U.S. 330 (1979) 17
Sackett v. *EPA*, 132 S. Ct. 1367 (2012) 4, 18
Solid Waste Agency of N. Cook Cnty. v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) 3
Texas Oil & Gas Ass'n v. *United States EPA*, 161 F.3d 923 (5th Cir. 1998) 16
United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) 3
United States Army Corps of Eng'rs v. *Hawkes Co.*, 136 S. Ct. 1807 (2016) 3
Virginia Elec. & Power Co. v. *Costle*, 566 F.2d 446 (4th Cir. 1977) 13, 15, 19
Virginia Military Inst. v. *United States*, 508 U.S. 946 (1993) 24
Washington Cattlemen's Ass'n v. *United States EPA*, No. 15-3058, 2016 WL 6645765 (D. Minn. Nov. 8, 2016) 9

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 6
5 U.S.C. 704 6
Clean Water Act, 33 U.S.C. 1251 *et seq.* 1
33 U.S.C. 1251(a) 2
33 U.S.C. 1311 ..... 4, 14
33 U.S.C. 1311(a) 2, 3, 13
33 U.S.C. 1311(c) 12
33 U.S.C. 1311(e) 16
33 U.S.C. 1313 18
33 U.S.C. 1319(a) 18
33 U.S.C. 1342 ..... 4, 8
33 U.S.C. 1342(a)(1) 2

Statutes and regulations—Continued: Page

33 U.S.C. 1342(a)(2) 2
33 U.S.C. 1342(b) 2
33 U.S.C. 1344(a) 2
33 U.S.C. 1362 8
33 U.S.C. 1362(7) 2, 3, 14
33 U.S.C. 1362(12) 14
33 U.S.C. 1362(12)(A) 2, 3, 20
33 U.S.C. 1369(b) 5
33 U.S.C. 1369(b)(1) 5, 6, 10, 11, 12
33 U.S.C. 1369(b)(1)(E) ..... *passim*
33 U.S.C. 1369(b)(1)(F) ..... *passim*
33 U.S.C. 1369(b)(2) 5
28 U.S.C. 2112(a)(3) 5
28 U.S.C. 2401(a) 6
33 C.F.R. 320-332 2
40 C.F.R.:
Section 122 2
Section 125 2
Section 230-232 2

Miscellaneous:

73 Fed. Reg. 33,699 (June 13, 2008) 20
80 Fed. Reg. (June 29, 2015):
p. 37,054 4
p. 37,055 ..... 4, 13
p. 37,057 4
H.R. Rep. No. 72, 100th Cong., 1st Sess. (1987) 5
H.R. Rep. No. 911, 92d Cong., 2d Sess. (1972) 4, 19
S. Rep. No. 414, 92d Cong., 2d Sess. (1971) 5

Miscellaneous—Continued: Page

Antonin Scalia & Bryan A. Garner, *Reading Law* (2012) 17

In the Supreme Court of the United States

No. 16-299

NATIONAL ASSOCIATION OF MANUFACTURERS

v.

DEPARTMENT OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-47a) is reported at 817 F.3d 261.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 2016. A petition for rehearing was denied on April 21, 2016 (Pet. App. 51a-52a). On July 1, 2016, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including September 2, 2016, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress enacted the Clean Water Act (CWA or Act), 33 U.S.C. 1251 *et seq.*, to "restore and maintain the chemical, physical, and biological integrity of

the Nation's waters." 33 U.S.C. 1251(a). To serve that goal, the CWA prohibits "the discharge of any pollutant by any person," except in compliance with the Act's various provisions, which include effluent-limitation restrictions and permitting programs. 33 U.S.C. 1311(a). The Act defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). The term "navigable waters," in turn, is defined to mean "the waters of the United States." 33 U.S.C. 1362(7).

The CWA establishes two major permitting programs to regulate the discharge of pollutants into the waters of the United States. First, the National Pollutant Discharge Elimination System (NPDES) program authorizes the Environmental Protection Agency (EPA) or a qualifying State to "issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title." 33 U.S.C. 1342(a)(1) and (b). NPDES permits generally control point-source discharges into waters of the United States by establishing permissible rates, concentrations, quantities of specified constituents, or other limitations and conditions as appropriate. See 33 U.S.C. 1342(a)(1) and (2); see generally 40 C.F.R. 122, 125; see also, *e.g.*, *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174, 176 (2000). Second, the Act authorizes the United States Army Corps of Engineers (the Corps) to issue permits "for the discharge of dredged or fill material into the navigable waters." 33 U.S.C. 1344(a); see generally 33 C.F.R. 320-332; 40 C.F.R. 230-232; see also, *e.g.*, *Coeur Alaska, Inc.* v. *Southeast Alaska Conservation Council*, 557 U.S. 261, 266, 268-269 (2009).

b. "[I]mportant consequences" flow from a determination that "a particular piece of property contains waters of the United States," because such a finding defines where the CWA's various prohibitions, permitting obligations, and other restrictions apply. *United States Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1812 (2016). If particular waters qualify as "waters of the United States," a person cannot discharge a pollutant into those waters from a point source unless authorized by a CWA permit or exempted by the Act. See 33 U.S.C. 1311(a), 1362(7) and (12)(A). If the waters are not "waters of the United States," no permit is required. The meaning of the term "waters of the United States" thus plays a central role in defining the reach of the CWA's restrictions.

This Court has previously considered the scope of the term "waters of the United States." See *Rapanos* v. *United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cnty.* v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). Most recently, in *Rapanos*, the Court vacated a ruling that particular wetlands qualified as such waters. 547 U.S. at 757. Although all Members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense, no opinion gained the support of a majority of the Court. See *id.* at 732, 742 (plurality opinion) (focusing on whether waters are "relatively permanent, standing or flowing," or have "a continuous surface connection" to such waters); *id.* at 779-780 (Kennedy, J., concurring in the judgment) (focusing on whether waters have a "significant nexus" to traditional navigable waters by significantly affecting their

chemical, physical, or biological integrity). Several Members of the Court have urged Congress or the agencies to "clarif[y] * * * the reach of the [CWA]" by adopting a statutory or regulatory definition of the term "waters of the United States." *Sackett* v. *EPA*, 132 S. Ct. 1367, 1376 (2012) (Alito, J., concurring); see *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring); *id.* at 811-812 (Breyer, J., dissenting).

In 2015, EPA and the Corps promulgated the Clean Water Rule to clarify the meaning of the term "waters of the United States." See 80 Fed. Reg. 37,054 (June 29, 2015). The Rule "reflects the agencies' goal of providing simpler, clearer, and more consistent approaches for identifying the geographic scope of the CWA." *Id.* at 37,057. The Rule "define[s] 'waters of the United States' to include eight categories of jurisdictional waters." *Ibid.* The Rule further "maintains existing exclusions for certain categories of waters, and adds additional categorical exclusions that are regularly applied in practice." *Ibid.* In defining the term "waters of the United States," the agencies relied on "the text of the statute, Supreme Court decisions, the best available peer-reviewed science, public input, and the agencies' technical expertise and experience in implementing the statute" for more than 40 years. *Id.* at 37,055. The agencies specified that the rule was issued under the legal authority provided by the CWA, including, *inter alia*, 33 U.S.C. 1311 and 1342. 80 Fed. Reg. at 37,055.

c. To "establish a clear and orderly process for judicial review," the CWA vests federal courts of appeals with exclusive original jurisdiction to review certain categories of EPA decisions implementing the Act. H.R. Rep. No. 911, 92d Cong., 2d Sess. 136 (1972)

(House Report); see S. Rep. No. 414, 92d Cong., 2d Sess. 85 (1971) (noting the need for "even and consistent" application of nationwide administrative actions). As relevant here, the courts of appeals have original jurisdiction over petitions for review of EPA actions

> (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, [and]
>
> (F) in issuing or denying any permit under section 1342 of this title[.]

33 U.S.C. 1369(b)(1)(E) and (F).

Petitions for review pursuant to Section 1369(b) generally must be filed within 120 days after the challenged agency action. 33 U.S.C. 1369(b). When multiple petitions for review are filed to challenge a single action, those petitions are consolidated before one court of appeals, chosen randomly from the circuits in which petitions were filed in the first ten days, to avoid forum shopping and the potential for conflicting decisions. 28 U.S.C. 2112(a)(3); see H.R. Rep. No. 72, 100th Cong., 1st Sess. 2 (1987). Any agency action "with respect to which review could have been obtained under [Section 1369(b)(1)] shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. 1369(b)(2); see *Decker* v. *Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1334 (2013). Section 1369(b) thereby promotes the ability of regulators, the regulated community, and the public to rely on the validity of agency actions that are not promptly challenged or that are upheld by a court of appeals.

Final agency action that is reviewable under general principles of administrative law, but that falls outside the categories enumerated in Section 1369(b)(1),

may generally be challenged in federal district court under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* See 5 U.S.C. 704. An APA suit may be brought at any time within six years after the date of the challenged agency action. 28 U.S.C. 2401(a).

2. Shortly after the Clean Water Rule was promulgated, multiple petitions for review of the Rule were filed pursuant to Section 1369(b)(1) and consolidated in the Sixth Circuit. Pet. App. 3a. In October 2015, the Sixth Circuit issued a nationwide stay of the Rule pending the court's consideration of the Rule's validity. *Id.* at 5a. Petitioner intervened in the consolidated cases and filed a motion to dismiss, contending that the court of appeals lacked jurisdiction to consider the Rule under Section 1369(b)(1). The court of appeals denied petitioner's motion to dismiss. *Id.* at 2a-45a.

a. Judge McKeague, who announced the court's judgment in the lead opinion, concluded that two provisions of Section 1369(b)(1) authorized direct review of the Clean Water Rule in the courts of appeals. Pet. App. 3a-26a.

First, Judge McKeague found the Rule reviewable under Section 1369(b)(1)(E), which applies to "effluent limitation[s] or other limitation[s] under section 1311, 1312, 1316, or 1345" of Title 33. 33 U.S.C. 1369(b)(1)(E). Judge McKeague concluded that the Rule qualified as an "other limitation" because it expands "regulatory authority in some instances" through the clarified definition of "waters of the United States," and thereby "impos[es] * * * additional restrictions on the activities of some property owners" and "alter[s] permit issuers' authority to restrict point-source operators' discharges into covered waters." Pet. App. 15a. Judge McKeague further observed that, for purposes of Sec-

tion 1369(b)(1)(E), the Clean Water Rule imposes limitations "under section 1311" because EPA had relied in part on Section 1311 as a source of authority to promulgate the Rule. *Id.* at 15a n.4. Judge McKeague stated that a contrary jurisdictional ruling "would produce * * * 'a truly perverse situation'" because it would imply that "Congress intended to provide direct circuit court review of * * * individual actions" in issuing or denying permits under the NPDES program, "but intended to exclude from such review the definitional Rule on which the process is based." *Id.* at 15a (quoting *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 136 (1977)).

Second, Judge McKeague concluded that jurisdiction exists to consider the Clean Water Rule under Section 1369(b)(1)(F), which authorizes review of EPA action "in issuing or denying any permit" under the NPDES program, 33 U.S.C. 1369(b)(1)(F). Pet. App. 17a-24a. Judge McKeague observed that, in *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193, 196-197 (1980) (*Crown Simpson*) (per curiam), this Court had rejected a "strict literal application" of Section 1369(b)(1)(F), instead interpreting the statute to encompass agency action that is "functionally similar" to the issuance or denial of a permit. Pet. App. 17a (quoting *Crown Simpson*, 445 U.S. at 196). Judge McKeague further relied on a Sixth Circuit decision that had followed the analysis in *Crown Simpson* and had held that Section 1369(b)(1)(F) "authorizes direct circuit court review not only of actions issuing or denying particular permits, but also of regulations governing the issuance of permits." *Id.* at 18a (citing *National Cotton Council of Am.* v. *United States EPA*, 553 F.3d 927, 933 (6th Cir. 2009) (*National*

Cotton), cert. denied, 559 U.S. 936, and 130 S. Ct. 1505 (2010)). Because he found that the Clean Water Rule "indisputably expands regulatory authority and impacts the granting and denying of permits in fundamental ways," Judge McKeague concluded that the Rule was reviewable pursuant to Section 1369(b)(1)(F). *Id.* at 21a.

b. Judge Griffin concurred in the judgment. Pet. App. 27a-45a. He agreed that, under the interpretation of Section 1369(b)(1)(F) that the Sixth Circuit had adopted in *National Cotton*, that provision authorized review of the Clean Water Rule because the "Rule defines what waters necessarily require permits, and therefore is undoubtedly a 'regulation[] governing the issuance of permits under section 402 [33 U.S.C. § 1342].'" *Id.* at 44a (quoting *National Cotton*, 553 F.3d at 933). Although Judge Griffin disagreed with *National Cotton*, he found it controlling and consistent with "the predominant view of the other circuits." *Id.* at 44a n.2.

Judge Griffin did not believe that Section 1369(b)(1)(E) authorized review of the Clean Water Rule. Pet. App. 29a-38a. In his view, the Rule did not qualify as an "other limitation" within the meaning of that provision because the Rule interprets a term in the Act's definitional section, 33 U.S.C. 1362, and "sets the jurisdictional reach for whether the discharge limitations even apply in the first place." Pet. App. 31a-32a.

c. Judge Keith dissented. Pet. App. 45a-47a. He did not view *National Cotton* as controlling and would have held that the Clean Water Rule fell outside the jurisdiction conferred by Section 1369(b)(1)(E) and (F). *Ibid.*

d. Under the schedule set by the Sixth Circuit, briefing on the merits of the challenges to the Clean Water Rule will be completed in March 2017. The Sixth Circuit has specified that oral argument will be scheduled "as soon as practicable after the briefing is complete." C.A. Doc. 125, at 2 (Oct. 25, 2016).

3. Petitioner and other parties have filed numerous APA challenges to the Clean Water Rule in district courts throughout the country. See Pet. 8 nn.1 & 2. The courts in most of those cases have stayed the proceedings, held the cases in abeyance, or dismissed the suits without prejudice while the Sixth Circuit considers the challenges to the Clean Water Rule.

Five district courts have concluded that they lack jurisdiction to review the Clean Water Rule because exclusive jurisdiction is vested in the courts of appeals pursuant to Section 1369(b)(1). See *Washington Cattlemen's Ass'n* v. *United States EPA*, No. 15-3058, 2016 WL 6645765, at *3 (D. Minn. Nov. 8, 2016); *Ohio* v. *EPA*, 15-cv-02467 Docket entry No. 54, at 1 (S.D. Ohio Apr. 25, 2016); *Oklahoma ex rel. Pruitt* v. *United States EPA*, No. 15-cv-0381, 2016 WL 3189807, at *2 (N.D. Okla. Feb. 24, 2016); *Georgia* v. *McCarthy*, No. CV 215-79, 2015 WL 5092568, at *1 (S.D. Ga. Aug. 27, 2015); *Murray Energy Corp.* v. *United States EPA*, No. 15CV110, 2015 WL 5062506, at *1 (N.D. W. Va. Aug. 26, 2015). To date, three of those decisions have been appealed. The Sixth Circuit stayed the case filed in the Southern District of Ohio pending its merits decision in this case. *Ohio* v. *EPA*, 16-3564 Doc. 13, at 1 (July 1, 2016). The Eleventh Circuit likewise stayed the case filed in the Southern District of Georgia, reasoning that "[i]t would be a colossal waste of judicial resources" to consider the case before the Sixth

Circuit adjudicated the merits of the Clean Water Rule. *Georgia* v. *McCarthy*, 833 F.3d 1317, 1321 (2016). The Tenth Circuit recently heard oral argument on the jurisdictional question in the case on appeal from the Northern District of Oklahoma. See *Chamber of Commerce of the U.S.* v. *EPA*, No. 16-5038 (argued Nov. 17, 2016).

Before the Sixth Circuit issued its jurisdictional ruling in this case, one district court had asserted jurisdiction over an APA challenge to the Clean Water Rule. See *North Dakota* v. *U.S. EPA*, 127 F. Supp. 3d 1047, 1052-1053 (D.N.D. 2015). Following the Sixth Circuit's ruling, however, that district court noted that it was "unclear whether [it] continues to retain jurisdiction," and the court stayed the proceedings pending any further decision by the courts of appeals or this Court. *North Dakota* v. *U.S. EPA*, 15-cv-59 Docket entry No. 156, at 3 (D.N.D. May 24, 2016).

To date, no briefing on the merits has occurred or been scheduled in any of the district court cases.

ARGUMENT

The court of appeals correctly held that Section 1369(b)(1) vests it with original jurisdiction to consider the validity of the Clean Water Rule. That conclusion is consistent with this Court's precedents, the decisions of other court of appeals, and Congress's purpose in authorizing direct court of appeals review. And, under this Court's established practices, the interlocutory posture of the case provides an additional reason to deny certiorari. Further review is not warranted.

1. Petitioner contends (Pet. 14-20) that Section 1369(b)(1) does not confer jurisdiction on the court of appeals to review the Clean Water Rule. That argu-

ment lacks merit. As Judge McKeague observed, jurisdiction is proper under the pragmatic construction of Section 1369(b)(1) that this Court adopted in *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977) (*E.I. du Pont*), and *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193 (1980) (*Crown Simpson*) (per curiam). In both of those decisions, the Court considered the CWA's structure and objectives and concluded that Section 1369(b)(1) should be read broadly to authorize original jurisdiction in the courts of appeals of EPA actions that directly affect CWA permitting decisions. The Court recognized, in particular, that it would be highly anomalous for district courts to review overarching EPA actions having a systemic effect on the CWA permitting process, when EPA decisions on particular permit applications are reviewable only in the courts of appeals. During the ensuing decades, the approach endorsed in *E.I. du Pont* and *Crown Simpson* has governed the allocation of authority between the courts of appeals and district courts to review EPA action in administering the CWA. Because the purpose and effect of the Clean Water Rule is to identify the locations where the CWA's prohibitions apply and where permits are required, the Rule falls within the categories of agency action that are reviewable under Section 1369(b)(1)(E) and (F).

a. In *E.I. du Pont*, the Court held that EPA's effluent limitations guideline regulations were directly reviewable in the courts of appeals under Section 1369(b)(1)(E), which provides for review of EPA actions "in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345." 33 U.S.C. 1369(b)(1)(E). The Court rejected the industry challengers' argument "that the

reference to [Section 1311] [in Section 1369(b)(1)(E)] was intended only to provide for review of the grant or denial of an individual variance pursuant to [Section 1311(c)]." 430 U.S. at 136. That narrow construction, the Court explained, would "produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits pursuant to [Section 1342] [under Section 1369(b)(1)(F)] but would have no power of direct review of the basic regulations governing those individual actions." *Ibid.*

In *Crown Simpson*, the Court similarly relied on practical considerations to read Section 1369(b)(1) broadly. There, the Court held that Section 1369(b)(1)(F), which authorizes review of EPA actions "in issuing or denying any [NPDES] permit," extended to EPA's veto of an NPDES permit proposed by the state permitting authority. 445 U.S. at 195 (citation omitted). The Ninth Circuit had concluded that it lacked original jurisdiction because "EPA's veto of a state-issued permit did not constitute 'issuing or denying' a permit." *Id.* at 196. This Court reversed, agreeing with a concurring judge's observation that "vesting jurisdiction in the courts of appeals * * * would best comport with the congressional goal of ensuring prompt resolution of challenges to EPA's actions and would recognize that EPA's veto of a state-issued permit is functionally similar to its denial of a permit in States which do not administer an approved permit-issuing program." *Ibid.* The Court declined to read Section 1369(b)(1) as creating an "irrational bifurcated system" of review that made "denials of NPDES permits * * * reviewable at different levels of the federal-court system depending on the fortuitous circumstances

of whether the State in which the case arose was or was not authorized to issue permits." *Id.* at 196-197.

b. Under the interpretive approach used by this Court in *E.I. du Pont* and *Crown Simpson*, the Clean Water Rule falls within the jurisdiction conferred by Section 1369(b)(1)(E) and (F). First, the Rule constitutes EPA action "in approving or promulgating any effluent limitation or *other limitation* under section 1311." 33 U.S.C. 1369(b)(1)(E) (emphasis added). Although the Act does not define "other limitation," inclusion of that language in Section 1369(b)(1)(E) reflects an evident congressional intent to authorize direct court of appeals review of some category of "limitation[s]" that are distinct from the effluent limitations that are specifically covered. See *Virginia Elec. & Power Co.* v. *Costle*, 566 F.2d 446, 449 (4th Cir. 1977) (*VEPCO*) (explaining that, although the legislative history does not explain the intended meaning of the phrase "other limitation," the court "cannot assume that its inclusion was meaningless or inadvertent").

The Clean Water Rule qualifies as an "other limitation" because, by clarifying the scope of the statutory term "waters of the United States," the Rule triggers the Act's prohibitions on the discharge of pollutants and its permitting requirements. See, *e.g.*, *VEPCO*, 566 F.2d at 450 (interpreting the phrase "other limitation" in Section 1369(b)(1)(E) to refer broadly to any "restriction on the untrammeled discretion of the industry"). The Rule's limitations, moreover, arise in part under Section 1311, which the agencies cited as authority to issue the Rule. See 80 Fed. Reg. at 37,055. Because Section 1311(a) restricts the "discharge of any pollutant," 33 U.S.C. 1311(a), and the CWA defines that phrase to include the addition of a pollutant

to the waters of the United States, 33 U.S.C. 1362(7) and (12), the Rule's definition of the term "waters of the United States" helps to delineate the practical scope of Section 1311's prohibition on discharges.

The Clean Water Rule also is reviewable under Section 1369(b)(1)(F), which provides for review of EPA action "in issuing or denying any permit under section 1342." 33 U.S.C. 1369(b)(1)(F). Like the regulation at issue in *E.I. du Pont*, the Rule is a "basic regulation[] governing" individual permitting decisions because it delineates where permits are required and so sets the entire NPDES permitting scheme in motion. 430 U.S. at 136. A denial of court of appeals jurisdiction to consider the Rule "would produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits * * * but would have no power of direct review of the basic regulations governing those individual actions." *Ibid.*

As this Court emphasized in *Crown Simpson*, Congress enacted Section 1369 to "ensur[e] prompt resolution of challenges to EPA's actions." 445 U.S. at 196. The Sixth Circuit's jurisdictional determination ensures that all challenges to the Clean Water Rule, which applies nationwide and is central to the implementation and enforcement of the CWA, can be resolved promptly and efficiently in a single appellate forum. The timing and mode of review that Congress prescribed in Section 1369(b) prevents the risk of prolonged uncertainty for EPA, the regulated community, and the public as to the validity of the regulatory definition of "waters of the United States," which triggers all of the Act's prohibitions and permitting obligations.

"National uniformity, an important goal in dealing with broad regulations, is best served by initial review in a court of appeals." *Natural Res. Def. Council, Inc.* v. *U.S. EPA*, 673 F.2d 400, 405 n.15 (D.C. Cir. 1982) (*NRDC*) (R.B. Ginsburg, J.), cert. denied, 459 U.S. 879 (1982); see *VEPCO*, 566 F.2d at 451 (observing that "the jurisdictional scheme of the Act * * * in general leaves review of standards of nationwide applicability to the courts of appeals, thus furthering the aim of Congress to achieve nationally uniform standards"). Without the prompt and consolidated court of appeals review provided by Section 1369(b)(1), "several different district courts would proceed to review the NPDES-related [regulations]" over a far more extended period of time, "with the attendant risk of inconsistent decisions initially and on appeal." *NRDC*, 673 F.2d at 405 n.15; see *E.I. du Pont*, 430 U.S. at 128 n.18 (noting the "practical problems and potential for inconsistent rulings created by bifurcated review" under Section 1369(b)(1)). Each of those district courts, moreover, would be required to assess the massive administrative record, which exceeds 350,000 pages and includes detailed and technical scientific justifications for the jurisdictional lines that the Rule draws. See *E.I. du Pont*, 430 U.S. at 128 (considering it "almost inconceivable" that Congress in enacting Section 1369(b)(1) would have intended multiple courts to engage in "duplicate review" of an extensive "and highly technical" administrative record). Rather than attribute to Congress an intent to invite prolonged challenges and potentially conflicting judicial decisions regarding the validity of the Clean Water Rule, the court of appeals correctly accorded Section

1369(b)(1) a "practical rather than a cramped construction." *NRDC*, 673 F.2d at 405.

b. Petitioner's contrary arguments lack merit.

Petitioner contends (Pet. 17-18) that the Clean Water Rule does not constitute a "limitation" within the meaning of Section 1369(b)(1)(E) because it is not self-executing—that is, it restricts private conduct only in conjunction with other provisions of the Act. But because the Rule's definition of "waters of the United States" triggers the Act's prohibitions and permitting requirements, it is properly understood as a limitation under any ordinary definition of that term. Indeed, petitioner alleged in its district court complaint that the Rule "imposes impossible burdens" that its members must "comply" with, and that the Rule requires those members "either to alter their activities * * * or to obtain permits when previously they would not have had to." *American Farm Bureau Fed'n* v. *U.S. EPA*, 15-cv-165 Docket entry No. 1, at 3, 12, 14 (S.D. Tex. July 2, 2015) (Complaint).[1]

Petitioner also invokes (Pet. 18) the *ejusdem generis* canon to argue that an "other" limitation under Section 1369(b)(1)(E) must be similar to an effluent

---

[1] Section 1369(b)(1) unambiguously confers jurisdiction over some agency actions whose effect on private conduct depends on their interaction with other CWA provisions. For example, regulations that establish effluent limitations are reviewable under Section 1369(b)(1)(E) even though they do not directly apply to pollutant dischargers when they are promulgated, but take effect only during the NPDES permitting process when they are used to formulate the terms of a discharger's permit. See 33 U.S.C. 1311(e); see also *Texas Oil & Gas Ass'n* v. *United States EPA*, 161 F.3d 923, 928 (5th Cir. 1998) (noting that some actions reviewable under Section 1369(b)(1)(E) "achieve their bite only after they have been incorporated into NPDES permits").

limitation. The *ejudsem generis* canon applies "[w]here general words follow an enumeration of two or more things," as "when a drafter has tacked on a catchall phrase at the end of an enumeration of specifics." Antonin Scalia and Bryan A. Garner, *Reading Law* 199 (2012); see, *e.g.*, *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2171 (2012). But Section 1369(b)(1)(E) refers only to "effluent limitations" and "other limitations," and the disjunctive "or" that separates those terms requires that they be given separate meanings. See *Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 (2014). To "give effect * * * to every word Congress used," *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979), the term "other limitation" must refer to restrictions that are *not* effluent limitations.

Petitioner also asserts (Pet. 15) that Section 1369(b)(1)(F) does not confer jurisdiction because the Clean Water Rule "does not issue or deny a permit." That argument resurrects the reasoning of the Ninth Circuit that this Court rejected in *Crown Simpson*. See 445 U.S. at 196. Petitioner's attempt (Pet. 15-16) to confine *Crown Simpson* to its facts ignores this Court's analysis in the case, which emphasized "the congressional goal of ensuring prompt resolution of challenges to EPA's actions" and refused to read the statute to create an "irrational bifurcated system" of review. 445 U.S. at 196-197. Petitioner's interpretation would produce just such an irrational system. Petitioner reads the statute to require immediate direct court of appeals review of individual permitting decisions (presumably including challenges to EPA's authority to require a permit under the Rule), but to provide an extended period of district court review of

the foundational regulation that prescribes where permits must be obtained.

Contrary to petitioner's suggestion (Pet. 16-17, 19-20), the decision below does not render Section 1369(b)(1) "limitless." Pet. 19. Many EPA actions under the Act impose limitations essential to the proper operation of the NPDES permitting system or directly govern the issuance of those permits and so are reviewable under Section 1369(b)(1). But other EPA actions do not fall within Section 1369(b)(1)'s coverage. See, *e.g.*, *Sackett* v. *EPA*, 132 S. Ct. 1367 (2012) (reviewing case originating in district court that challenged an administrative compliance order issued under Section 1319(a)); *American Farm Bureau Fed'n* v. *United States EPA*, 792 F.3d 281 (3d Cir. 2015) (reviewing case originating in district court that challenged total maximum daily loads promulgated under Section 1313), cert. denied, 136 S. Ct. 1246 (2016). The Sixth Circuit's pragmatic construction of the statute respects this Court's precedents and fulfills the Act's purposes without "turn[ing] [Section 1369(b)(1)] into a comprehensive review provision that Congress did not intend it to be." *NRDC*, 673 F.2d at 404 n.14.

Petitioner's policy arguments (Pet. 28-31) also lack merit. Petitioner contends (Pet. 29-30) that, because APA review in the district courts may generate multiple decisions on the Rule's validity and potentially produce a circuit split, that approach will "increase the possibility of a correct disposition" and "tee up issues more thoroughly for this Court's consideration." Pet. 30 (citation and internal quotation marks omitted). But Congress made a different judgment in enacting Section 1369(b)(1). By providing for direct court of appeals review on an expedited timeline, Congress

sought to "establish a clear and orderly process for judicial review" that would prevent the extended uncertainty and risk of conflicting judicial decisions that petitioner embraces. House Report 136.

2. Contrary to petitioner's contention (Pet. 20-24), the decision below does not conflict with any decision of another court of appeals. Petitioner cites decisions that considered whether Section 1369(b)(1) authorized direct court of appeals review of EPA determinations that particular activities fell *outside* the CWA's coverage. The Clean Water Rule, by contrast, defines the waters of the United States that are subject to the Act's limitations and permitting obligations. Petitioner identifies no court of appeals decision that has found Section 1369(b)(1) inapplicable to a regulation with that effect.[2]

a. In accordance with this Court's decisions in *E.I. du Pont* and *Crown Simpson*, the courts of appeals have consistently interpreted Section 1369(b)(1) to authorize review of final EPA action that imposes "a limitation on point sources and permit issuers" and "restrict[s] * * * the untrammeled discretion of the industry." *VEPCO*, 566 F.2d at 450; see *Iowa League of Cities* v. *EPA*, 711 F.3d 844, 866 (8th Cir. 2013);

---

[2] Petitioner observes (Pet. 23-24) that, before the Sixth Circuit issued its decision in this case, one district court had concluded that Section 1369(b)(1) does not authorize review of the Clean Water Rule. See *North Dakota* v. *United States EPA*, 127 F. Supp. 3d 1047, 1052-1053 (D.N.D. 2015). After the court below issued its decision, however, that district court stated that, "[b]ased on the ruling by the Sixth Circuit, it is unclear whether this court continues to retain jurisdiction," and it stayed the proceedings pending any further decision by the courts of appeals or this Court. *North Dakota* v. *U.S. EPA*, 15-cv-59 Docket entry No. 156, at 3 (May 24, 2016).

Friends of the Everglades v. *United States EPA*, 699 F.3d 1280, 1287 (11th Cir. 2012), cert. denied, 134 S. Ct. 421, and 134 S. Ct. 422 (2013); *Northwest Envtl. Advocates* v. *United States EPA*, 537 F.3d 1006, 1016 (9th Cir. 2008); *NRDC*, 673 F.2d at 405 (D.C. Cir.). The Sixth Circuit's decision in this case, which found the Clean Water Rule reviewable because it "produce[s] various limitations on point-source operators and permit issuing authorities," Pet. App. 17a, fits comfortably within that body of precedent. See *id.* at 11a (observing that the Sixth Circuit's interpretation of Section 1369 "finds support in several decisions of our sister circuits"); *id.* at 44a n.2 (Griffin, J., concurring in the judgment) (recognizing that the Sixth Circuit's interpretation does not "diverge[] from the predominant view of the other circuits").

b. Petitioner asserts (Pet. 21-23) that the court of appeals' decision conflicts with the Eleventh Circuit's decision in *Friends of the Everglades*, *supra*, and the Ninth Circuit's decision in *Northwest Environmental Advocates*, *supra*. Petitioner's reliance on those decisions is misplaced.

In *Friends of the Everglades*, the Eleventh Circuit held that it lacked jurisdiction under Section 1369(b)(1) to consider an EPA rule providing that no CWA permit was required for certain transfers of water from one body of water to another. 699 F.3d at 1284. That rule was premised on EPA's conclusion that the transfers at issue fall outside the CWA's definition of "discharge" because they do not involve the "addition of any pollutant to navigable waters," 33 U.S.C. 1362(12)(A). See 73 Fed. Reg. 33,699 (June 13, 2008). The Eleventh Circuit held that the challenged rule did not qualify as a "limitation" within the meaning of

Section 1369(b)(1)(E) because it "imposes no restrictions on entities engaged in water transfers," but instead "does the exact opposite" by "free[ing] the industry from the constraints of the permit process." *Friends of the Everglades*, 699 F.3d at 1286-1287. The court distinguished prior decisions of the D.C. and Fourth Circuits, which had exercised jurisdiction under Section 1369(b)(1)(E) to review EPA regulations that governed the NPDES permitting process, on the ground that the regulations at issue in those cases had restricted industry discretion. See *id.* at 1287. The court further held that Section 1369(b)(1)(F) did not confer jurisdiction because "a permanent exemption from the permit program frees the discharging entities from further monitoring, compliance, or renewal procedures," which the court considered to be "meaningfully different from the action that the Supreme Court held in *Crown Simpson* to be functionally similar to the denial of a permit." *Id.* at 1288.

As petitioner observes (Pet. 21), the Eleventh Circuit's ruling in *Friends of the Everglades* conflicts with the Sixth Circuit's decision in *National Cotton Council of America* v. *United States EPA*, 553 F.3d 927 (2009) (*National Cotton*), cert. denied, 559 U.S. 936, and 130 S. Ct. 1505 (2010), which held that Section 1369(b)(1) conferred jurisdiction on the court of appeals to review an EPA regulation that exempted certain pesticide applications from the CWA's permitting requirements, *id.* at 929, 933. That disagreement may warrant review in an appropriate case,[3] but it is

[3] The government sought this Court's review of the Eleventh Circuit's decision in *Friends of the Everglades*, but the Court denied the petition. *EPA* v. *Friends of the Everglades*, 134 S. Ct. 421 (2013) (No. 13-10).

not implicated here. Unlike the regulation at issue in *Friends of the Everglades*, the Clean Water Rule restricts pollutant dischargers and permit issuers by clarifying that discharges of pollutants into waters covered by the Rule require a permit and are prohibited without one. Because the Eleventh Circuit drew a sharp jurisdictional line between regulations that restrict industry discretion and those that "free[] the industry from the constraints of the permit process and allow[] the discharge of pollutants," *Friends of the Everglades*, 699 F.3d at 1287, the Sixth Circuit's decision in this case is "readily reconcilable" with *Friends of the Everglades*. See Pet. App. 14a.[4]

Contrary to petitioner's contention (Pet. 22-23), the decision below does not conflict with the Ninth Circuit's decision in *Northwest Environmental Advocates*. There, the Ninth Circuit held that Section 1369(b)(1) did not authorize review of an EPA regulation that

---

[4] Petitioner contends (Pet. 22) that the regulation at issue in *Friends of the Everglades* created limitations in addition to exemptions, but the Eleventh Circuit did not view the rule that way, instead finding that it "impose[d] no restrictions on entities engaged in water transfers." 699 F.3d at 1286. In contrast, the Clean Water Rule "impose[s] * * * additional restrictions on the activities of some property owners." Pet. App. 15a. Petitioner's speculation (Pet. 22) that the Eleventh Circuit would decline to exercise jurisdiction to review a regulation having that effect is unfounded in light of that court's emphasis on the distinction between limitations and exemptions. See *Georgia* v. *McCarthy*, No. CV215-79, 2015 WL 5092568, at *2 (S.D. Ga. Aug. 27, 2015) (recognizing that *Friends of the Everglades* "looked to the impact of the rule to see if it restricted pollutants," and concluding that the Clean Water Rule is subject to direct court of appeals review under that analysis because "its undeniable and inescapable effect is to restrict pollutants and subject entities to the requirements of the [CWA's] permit program").

exempted certain vessel discharges from the Act's permit requirements. 537 F.3d at 1010, 1015-1018. The court held that Section 1369(b)(1)(E) did not encompass the regulation because EPA's action in exempting certain discharges from the CWA "provides no limitation whatsoever." *Id.* at 1016. The court further held that Section 1369(b)(1)(F) did not apply because the regulatory exemption was not tethered to specific CWA provisions involving the NPDES permitting process and so could not be characterized as "involv[ing] the issuance or the denial of a permit or a functionally similar action." *Id.* at 1018.

The Sixth Circuit's decision in this case does not conflict with *Northwest Environmental Advocates* because the Clean Water Rule's definition of "waters of the United States" reflects EPA's interpretation of specific language in the CWA and effects a limitation on entities who would discharge into waters covered by that definition. Indeed, the court in *Northwest Environmental Advocates* specifically recognized that Section 1369(b)(1) confers jurisdiction to consider a regulation with those features. The Ninth Circuit acknowledged that EPA regulations that interpret express exemptions contained in the CWA are reviewable under Section 1369(b)(1). 537 F.3d at 1017 (distinguishing *Natural Resources Defense Council, Inc.* v. *United States EPA*, 966 F.2d 1292 (9th Cir. 1992), and *Natural Resources Defense Council* v. *United States EPA*, 526 F.3d 591 (9th Cir. 2008)). The court also distinguished a prior Ninth Circuit decision that had "exercised jurisdiction under [Section 1369(b)(1)(F)] over a challenge to an EPA regulation of stormwater discharges from inactive mining operations" on the ground that the earlier case had involved a challenge

to "the requirement that certain mines obtain a permit, not an exemption." *Id.* at 1016-1017 (distinguishing *American Mining Congress* v. *United States EPA*, 965 F.2d 759, 763 (9th Cir. 1992)). The Sixth Circuit's decision therefore is not "at odds" (Pet. 22) with *Northwest Environmental Advocates*.

3. The interlocutory posture of this case also counsels against further review at this time. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (observing that the interlocutory nature of a case "alone furnishe[s] sufficient ground for the denial" of the petition for a writ of certiorari); see also, *e.g.*, *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari).

The Sixth Circuit "is significantly far[] along the decisional path" in resolving the challenges to the Clean Water Rule on the merits. *Georgia* v. *McCarthy*, 833 F.3d 1317, 1321 (11th Cir. 2016) (staying district court suit challenging the Clean Water Rule). Merits briefing will be completed in March 2017, and the Sixth Circuit has stated that oral argument will be scheduled "as soon as practicable" thereafter. C.A. Doc. 125, at 2 (Oct. 25, 2016). Because the Sixth Circuit has issued a nationwide stay of the Rule, the Rule will not place any burden on regulated entities while the litigation on the merits continues. If petitioner is satisfied with the Sixth Circuit's merits determination, this Court's review of the question presented may be unnecessary. If petitioner is dissatisfied with the Sixth Circuit's merits determination, it may raise the jurisdictional question, together with any other challenges arising from the Sixth Circuit's merits determination, in a single petition for a writ of certiorari following a

final judgment. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
JOHN C. CRUDEN
Assistant Attorney General
J. DAVID GUNTER II
ROBERT J. LUNDMAN
Attorneys

DECEMBER 2016